STATE OF MICHIGAN

COURT OF APPEALS

DEBBIE L. MANNS,

Plaintiff-Appellant,

v

DENNIS DAVID, and THE CITY OF SOUTHGATE,

Defendants-Appellees.

UNPUBLISHED
June 19, 2007

No. 274062
Wayne Circuit Court
LC No. 04-423050-NZ

Before: Bandstra, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendants. We affirm.

Defendant David's[1] predecessor as mayor appointed plaintiff to the position of Southgate City Administrator on February 14, 2000. When plaintiff accepted this position, she understood that the City Administrator is an at-will employee, who serves at the "exclusive pleasure of the mayor," and that if the mayor were defeated in a reelection bid, a new mayor would be free to select a new City Administrator and would have no obligation to retain plaintiff in that position. Shortly after defendant won election as mayor, in November 2003, he advised plaintiff that he would not be retaining her as City Administrator. In her complaint, plaintiff alleged that defendant wrongfully terminated her employment because: (1) she refused to violate the law by assisting defendant in firing Southgate's chief of police without just cause to do so and (2) she was involved in an investigation of a sexual harassment complaint against defendant while defendant was employed as a Southgate police officer, for which plaintiff recommended that defendant be disciplined. Defendant denied plaintiff's allegations, explaining that his decision not to retain plaintiff as City Administrator resulted from his view of the City Administrator as the mayor's "right hand man" and his lack of comfort retaining his former opponent's "right hand person" to be his confidant and to "run the city" in accordance with his philosophy.

[1] Because this action concerns only conduct by defendant David in his role as mayor, with defendant Southgate's alleged liability being vicarious, we refer to David singularly as "defendant" throughout this opinion.

Defendants moved for summary disposition of plaintiff's complaint, pursuant to MCR 2.116(C)(7), (8) and (10) on the basis that: (1) defendant's decision not to retain plaintiff as City Administrator was within the scope of his executive authority as mayor and therefore, that plaintiff's claim for wrongful discharge was barred by immunity, and (2) plaintiff failed to establish any causal link between her participation in the investigation of the prior sexual harassment claim against defendant and defendant's decision, more than two years later, not to retain her as City Administrator following his election as mayor. The trial court agreed and granted defendants' motion.[2]

On appeal, plaintiff first argues that the trial court erred in determining that defendant acted within the scope of his executive authority as mayor when he terminated plaintiff's employment because she refused to violate the law by firing or agreeing to fire the chief of police without just cause. We disagree.

This Court reviews a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(7) de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Davis v City of Detroit*, 269 Mich App 376, 378; 711 NW2d 462 (2005). As our Supreme Court explained in *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 592; 363 NW2d 641 (1984), "Judges, legislators and the highest executive officials of all levels of government are absolutely immune from all tort liability whenever they are acting within their respective judicial, legislative and executive authority."

While the "intentional use or misuse of a badge of governmental authority for a purpose unauthorized by law is not the exercise of a governmental function," *Marrocco v Randlett*, 431 Mich 700, 707-708; 433 NW2d 68 (1988) (quoting *Smith v Dep't of Public Health*, 428 Mich 540, 544, 611; 410 NW2d 749 (1987), the absolute immunity afforded to executive officials acting within their authority is not subject to any intent or "malevolent-heart exception." *American Transmissions, Inc v Attorney General*, 454 Mich 135, 143-144; 560 NW2d 50 (1997). Allegations that an official commits intentional torts or acts with an improper or unlawful motive or purpose are "meaningless" where the complained-of conduct is within the official's authority. *Armstrong v Ypsilanti Twp*, 248 Mich App 573, 593-594; 614 NW2d 321 (2001). Simply stated, regardless the official's motivation, the relevant inquiry is whether he acted within the scope of his authority. *American Transmissions, supra* at 144. If so, the official is absolutely immune from tort liability. *Ross, supra* at 592. Whether an official's acts are within his authority "depends on a number of factors, including the nature of the specific acts alleged, the position held by the official alleged to have performed the acts, the charter, ordinances, or other local law defining the official's authority, and the structure and allocation of powers in the particular level of government." *Id.* at 711.

There is no dispute that the mayor is the highest executive official of the City of Southgate government. Therefore, the question presented is whether defendant was acting

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[2] Plaintiff also asserted a claim for defamation relating to statements defendant allegedly made regarding plaintiff's performance as City Administrator for Southgate, which was also dismissed by the trial court pursuant to MCR 2.116(C)(8). Plaintiff is not appealing that ruling.

within his executive authority when he decided not to reappoint plaintiff to the position of City Administrator. In this regard, the Southgate Charter provides in relevant part:

> Sec 64 Appointment of officers; terms.
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> (a) Except as otherwise provided in this Charter, all department heads of the departments [sic], and members of the commissions and boards, of the City government, whether the same be established by this Charter or by act of Council, *shall be appointed by the Mayor* and the names of such appointees shall be certified, in writing, to the City Clerk on or before the second Monday in December following each regular biennial City election and at such other times as may be required to fill vacancies or to replace any head of a department or member of a commission or board who shall have been removed from office; provided, however, that the City Attorney and Assessor shall be appointed by the Mayor, but such appointment shall not be effective until it is confirmed by the majority of the City Council.
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> (c) The terms of office of each head of the departments of the City government and of members of all commissions and boards shall commence on the day following the second Monday in December following each regular biennial City election and upon the date of certification to the City Clerk in the case of appointees to fill a vacancy or to replace the head of any department or member of a commission or board who is removed from office.
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> (d) Unless a definite term of office is specified in this Charter for the head of any department of the City government, such department heads *shall hold office at the discretion of the Mayor*; *provided however, that no officer shall continue to hold office after the second Monday in December following a regular biennial City election unless he shall be reappointed for a new term*. (Emphasis added.)

We agree with the trial court that it was within defendant's executive authority under the City Charter to decide not to retain plaintiff as City Administrator. Indeed, plaintiff did not dispute that defendant had the authority to decline to reappoint her following his election as mayor. Instead plaintiff argued, relying on *Marrocco, supra* at 700, that defendant's decision not to reappoint her was premised on an improper motive, and therefore, was outside his executive authority as mayor. However, *Marrocco* does not support plaintiff's argument.

In *Marrocco*, our Supreme Court concluded, "the highest executive officials of local government are not immune from tort liability for *acts* not within their executive authority." *Marrocco, supra* at 710-711 (emphasis added). The Court observed that under the applicable portions of the city code the defendant mayor-elect lacked the authority to engage in the complained-of conduct, and therefore, that conduct was not within his executive authority and he would not be entitled to the defense of immunity for tort claims arising from that conduct. *Id.* at 709-710. The Court also concluded, on the limited record before it, that it "was questionable" whether other actions taken by the mayor-elect and by the city treasurer were within their

respective authority and remanded the case to the trial court for an initial determination of the scope of authority of the officials at issue under the city code. *Id.* at 710-711. However, nowhere in *Marrocco* did the Court provide that an official is not immune from tort liability for actions taken within his executive authority because of an improper motive. Rather, the Court clearly concluded that it is the actions themselves that determine whether immunity applies; an official is not entitled to immunity only if his *actions* exceed his authority, without regard to his motive for those actions. Here, unlike in *Marrocco*, there is no question that defendant was acting within the scope of his executive authority when he decided not to retain plaintiff as City Administrator.[3]

The instant case is akin to that presented in *Armstrong, supra* at 594. In *Armstrong*, the plaintiff alleged among other things that the defendants wrongfully eliminated funding for the plaintiff's administrative position within the township government, essentially terminating his employment, for a number of improper reasons, including his age, his medical condition and his involvement in attempting to organize employees into a union. This Court first concluded that it was within the defendants' statutory authority to eliminate funding for the plaintiff's position. This Court then explained that "[t]he fact that [the plaintiff] alleged that [the] defendants committed intentional torts, and that they had an improper motive and purpose in eliminating his position along with an unlawful intent, is meaningless in light of the language in *American Transmissions* because as we have held, defendants were acting within the scope of their statutory authority in eliminating that position." *Id.*

Pursuant to *American Transmission, supra* at 143-144, and *Armstrong, supra* at 593-594, defendant's motivation for his decision not to reappoint plaintiff as City Administrator is irrelevant; defendant is entitled to absolute immunity from tort liability for that decision because it was within his authority to decline to retain plaintiff in that position. *Ross, supra* at 592. Therefore, the trial court properly granted defendant's motion for summary disposition, pursuant to MCR 2.116(C)(7), on count I of plaintiff's complaint.

In her reply brief on appeal, plaintiff argues for the first time that Southgate Charter sections quoted above apply only to department heads, that the City Administrator is not a department head, and that as a result, the Charter does not provide defendant with the executive authority to rescind her appointment as City Administrator. Initially, we note that this argument was not raised below, and therefore, it is unpreserved. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Further, plaintiff acknowledged below that defendant had the authority to decline to reappoint her as City Administrator, but argued that his motivation rendered his conduct outside that authority. She now attempts to argue that defendant lacked any

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[3] On appeal, plaintiff also relies on *Baker v Couchman*, 271 Mich App 174; 721 NW2d 251 (2006), in which this Court held that a superintendent was not entitled to immunity from an allegation that he tortiously interfered with the employment relationship of the deputy sheriff employed as the school's resource officer, because the superintendent's actions in interfering with the plaintiff's investigation of various incidents was not within his executive authority. However, our Supreme Court has reversed that decision. *Baker v Couchman,* 477 Mich 1079; 729 NW2d 520 (2007). Therefore, it affords no support to plaintiff's argument.

such authority in the first place. "[A] party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court." *Living Alternatives for the Developmentally Disabled, Inc v Dep't of Mental Health*, 207 Mich App 482, 484; 525 NW2d 466 (1994). Finally, a reply brief must be confined only to a rebuttal of the appellee's arguments; raising a new issue in a reply brief does not properly present that issue for appeal. MCR 7.212(G); *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003). For these reasons, it is within this Court's discretion to decline to address the merits of this argument. *Id.*

That said, plaintiff's own words belie the merits of her argument. During her deposition, plaintiff acknowledged that she understood that the City Administrator was an at-will employee who serves at the "exclusive pleasure of the mayor" and that the mayor could sever that relationship at any time with or without cause. She also understood that a change in mayor could result in her losing her job and that nothing in the Charter provided for her continued employment in a new administration absent reappointment by the new mayor. Similarly, in a letter plaintiff authored supplementing her application for another position, plaintiff again acknowledged that the Southgate City Administrator serves at the "exclusive pleasure of the Mayor" and is "an at-will employee," and she observed that defendant's decision not to reappoint her, "no matter how unfortunate for [her, was] well-based within the democratic framework of the Mayor-City Council form of government." Thus, it is clear that everyone involved – including plaintiff – understood that "the structure and allocation of powers" within the Southgate government clearly provided the mayor with the executive authority to replace plaintiff as City Administrator at his discretion. *Marrocco, supra* at 711. Therefore, plaintiff's claim for wrongful termination is barred by the absolute governmental immunity from tort liability afforded to that decision. *Ross, supra* at 592.

Plaintiff also argues that the trial court erred in concluding that plaintiff failed to establish a genuine issue of material fact regarding the existence of a causal connection between her participation in the investigation of a sexual harassment complaint against defendant while he was serving as a member of the Southgate police department and defendant's decision to terminate plaintiff's employment as City Administrator following his election as mayor. We disagree.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003); *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). As this Court explained in *Barrett v Kirtland Community College*, 245 Mich App 306, 315; 628 NW2d 63 (2001):

> This Court has interpreted the retaliation provision of the [civil rights act], MCL § 37.2701(a)[], to require that a plaintiff prove a prima face case by showing:
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> > (1) that the plaintiff engaged in a protected activity, (2) that this was known by the defendant, (3) that the defendant took an employment action adverse to the plaintiff, and (4) that there was a causal connection between the protected activity and the adverse employment action.

> To establish causation, the plaintiff must show that his participation in activity protected by the [civil rights act] was a "significant factor" in the employer's adverse employment action, not just that there was a causal link between the two. [Citations omitted.]

A causal connection between protected activity and an adverse employment action "can be established through circumstantial evidence, such as close temporal proximity between the protected activity and adverse actions, as long as the evidence would enable a reasonable fact-finder to infer that an action had a . . . retaliatory basis." *Rymal v Baergen*, 262 Mich App 274, 303; 686 NW2d 241 (2004). However, "[s]ummary disposition for the defendant is appropriate when a plaintiff cannot factually demonstrate a causal link between the protected activity and the adverse employment action." *West v General Motors Corp*, 469 Mich 177, 184; 665 NW2d 468 (2003).

It is undisputed that participation in an investigation of a sexual harassment complaint is protected activity. MCL 37.2701(a). It is also undisputed that defendant took an adverse employment action against plaintiff when he declined to retain her as City Administrator. However, we agree with the trial court that plaintiff presented no evidence establishing or tending to establish either that defendant knew of her role in investigating the complaint or that such participation was a significant factor in defendant's decision not to reappoint plaintiff.

During her deposition, plaintiff acknowledged that she never spoke to defendant about the complaint or disciplined him directly for that complaint. Rather, plaintiff directed the chief of police to address the complaint with defendant. Plaintiff did not inquire of the chief regarding the content of his discussions with defendant and thus, had no knowledge whether the chief mentioned plaintiff's role regarding the complaint to defendant. Defendant's predecessor testified that she observed the chief advise plaintiff that he had spoken to defendant about the complaint and had disciplined him. Still, there is no testimony whatsoever establishing that defendant was advised or knew of *plaintiff's* participation in the investigation of the complaint. Plaintiff argues that such knowledge can be inferred from defendant's less than credible denial of any knowledge of the complaint prior to commencement of the instant action. However, plaintiff offered no evidence from which a fact-finder could reasonably infer that defendant was aware of *plaintiff's participation* regarding the complaint (as distinct from knowledge of the existence of the complaint itself).

Further, even if defendant's knowledge of plaintiff's role is presumed, plaintiff offered no evidence that her participation regarding the complaint was a significant factor in defendant's decision not to retain her as City Administrator. Plaintiff acknowledged that defendant made no mention of the complaint when he discussed his decision not to reappoint her. Plaintiff also acknowledged that she could offer no testimony or documentary evidence to support a conclusion that defendant declined to retain her as City Administrator because of her role regarding the complaint. Plaintiff asserts that given that defendant was not in a position to retaliate against plaintiff until 2003, that he "is a liar" as evidence by his "claimed ignorance" that there was any such complaint against him, that he terminated her employment without reviewing her performance or personnel files, and that he "obviously held women in extremely low regard," a reasonable jury could conclude that defendant retaliated against plaintiff for recommending that he be disciplined as a result of the complaint. However, the only basis presented for inferring a causal connection between plaintiff's participation in the investigation

of the complaint and defendant's decision not to retain her as City Administrator is the mere fact that plaintiff's participation in the investigation preceded defendant's decision. That an adverse employment action temporally follows a protected activity does not establish causation. Rather, "in order to show causation in a retaliatory discrimination case, '[p]laintiff must show something more than merely a coincidence in time between protected activity and adverse employment action.'" *Garg v Macomb County Community Mental Health Services*, 472 Mich 263, 286; 696 NW2d 646 (2005) (quoting *West*, *supra* at 186). Plaintiff presented no evidence establishing or tending to establish that her participation in investigating the complaint was "a significant factor" in defendant's decision not to retain her as City Administrator. Therefore, plaintiff failed to establish a prima facie case of retaliatory discharge, *Barrett*, *supra* at 306, and the trial court properly granted defendant's motion for summary disposition on this count.

We affirm.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood